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FOR THE “DEALS” NO SHOPPER COULD PASS UP: THE NINTH CIRCUIT’S INTERPRETATION OF CALIFORNIA’S FALSE ADVERTISING LAW IN *HINOJOS v. KOHL’S CORPORATION*

*Leslie E. Schuster**

I. INTRODUCTION

In 2004, California voters approved an initiative to eliminate private consumer standing under California’s False Advertising laws (FAL) and Unfair Competition laws (UCL) in most cases.¹ A broad coalition of business interests supported the campaign for this initiative, also known as Proposition 64 (“Prop. 64”).² The pro-Prop. 64 campaign claimed that California’s legal system had run amok because the consumer standing requirements encouraged “frivolous lawsuits,” of which businesses were the victims.³ However, there was little factual basis for this assertion, and the campaign glossed over the countless meritorious lawsuits that consumers pursued in order to address the financial and emotional injuries caused by

* J.D. Candidate, May 2015, Loyola Law School, Los Angeles; B.A. Political Science, University of Michigan, Ann Arbor, April 2010. I would like to thank Professor Jennifer Rothman for her guidance on this Comment and for always challenging me to do my best. Thank you to the talented and dedicated staff of the *Loyola of Los Angeles Law Review*. Finally, thank you to my family for their unending support and encouragement.

1. CAL. BUS. & PROF. CODE § 17500 (West 2013); *id.* § 17200. The 2004 amendment to section 17204 (which lays out the standing requirements to pursue claims under these statutes) did not eliminate consumer standing entirely, but significantly narrowed the meaning of “economic loss or injury,” as required to obtain standing. *See infra* Part IV. Under these amendments, consumers could still sue as members of a class action or if a public official initiated litigation on their behalf. BUS. & PROF. CODE § 17204.

2. CAL. SEC’Y OF STATE, TEXT OF PROPOSED LAWS, PROP. 64 (2004), *available at* <http://voterguide.sos.ca.gov/past/2004/general/propositions/prop64text.pdf>; *Yes on 64 Californians to Stop Shakedown Lawsuits*, FOLLOW THE MONEY, <http://www.followthemoney.org/database/StateGlance/committee.phtml?c=1219> (last visited Apr. 12, 2014) (featuring a table of the proponents’ top twenty contributors).

3. *See infra* Part IV.

deceptive business practices.⁴

In the ten years since Prop. 64's passage, consumer protection advocates have repeatedly expressed concern that the amended FAL and UCL "significantly limit[] the ability of private individuals and public interest groups to bring . . . consumer protection lawsuits against suspected corporate wrongdoers."⁵ As a matter of statutory interpretation, the extent to which Prop. 64 limited or removed private consumer standing was unclear.⁶ However, in *Hinojos v. Kohl's Corp.*,⁷ the Ninth Circuit Court of Appeals quelled consumer protection advocates' fears with its interpretation of the Prop. 64 amendments.⁸ *Hinojos* involved a department store that allegedly inflated "original" prices during "sales" to give the impression of a bargain based on purported reductions.⁹ The Ninth Circuit held that when a consumer alleges that he would not have made a purchase but for the retailer's misrepresentation of price, that consumer has suffered an economic injury sufficient to meet the standing requirement and state a claim under the FAL and UCL.¹⁰ This holding broadened the requisite injury for consumer suits to a

4. See Gregory Klass, *The Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 450, 463 (2012) (discussing the presumption of emotional injury caused by deception); see also Marc Lifsher, *Lockyer Joins Prop. 64 Fray*, L.A. TIMES, Oct. 1, 2004, <http://articles.latimes.com/2004/oct/01/business/fi-prop641> (discussing Prop. 64 supporters' fears that individuals were previously suing small businesses without having been directly harmed); *Fact Sheet: "Citizens Against Lawsuit Abuse" Groups*, CTR. FOR JUSTICE & DEMOCRACY, <http://centerjd.org/content/fact-sheet-citizens-against-lawsuit-abuse-groups> (last visited Oct. 20, 2013) ("The CALA message is a sly deception designed to appeal broadly to patriotic, hard-working Americans, many of whom will ultimately serve on juries. At its core, the message equates the efforts of injured consumers to recover damages from those responsible with 'lawsuit abuse.'").

5. Lifsher, *supra* note 4 (internal quotation marks omitted); see also Letter from Kriss Worthington, Councilmember, City of Berkeley, Cal. to the Mayor and City Council (Oct. 12, 2004) (on file with the City of Berkeley) ("Limits individuals right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered financial/property loss because of, an unfair business practice.").

6. See Bruce A. Colbath, *California Supreme Court Further Clarifies Standing Requirements of the Unfair Competition Law*, 65 CONSUMER FIN. L. Q. REP. 288, 290 (2011); see also Sharon J. Arkin, *The Unfair Competition Law after Proposition 64: Changing the Consumer Protection Landscape*, 32 W. ST. U. L. REV. 155, 158 (2005) ("According to [*Stop Youth Addiction v. Lucky Stores, Inc.*, 950 P.2d 1086, 1090-91 (Cal. 1998)], the only reasonable construction of the Unfair Competition Law is that its remedies are not available to private parties if the Legislature did not include an express private right of action in the enforcement scheme for the underlying law.").

7. 718 F.3d 1098 (9th Cir. 2013).

8. See *id.* at 1104-05, 1107.

9. *Id.* at 1102.

10. *Id.* at 1107.

materiality standard in false sales cases.¹¹

Hinojos expands the California Supreme Court's holding in *Kwikset Corp. v. Superior Court*,¹² which concluded that material misrepresentations as to origin and composition of consumer goods purchased are sufficient injuries to establish standing for false advertising claims against retailers.¹³ Now in *Hinojos*, with the finding that "price advertisements matter,"¹⁴ the Ninth Circuit has reopened the door to pre-Prop. 64 standards for consumers to privately sue retailers who take advantage of consumers through dishonest sales techniques.

This Comment asserts that the Ninth Circuit's reading of California statutes and California Supreme Court precedent balanced traditional notions of injury for standing purposes with consumer protection policy and, in so doing, advanced consumer rights in California.¹⁵ Yet, while consumers' right to sue has been affirmed in California, at the federal level and among several other states, statutes prohibiting false advertising and unfair competition still primarily serve only competitive business interests.¹⁶ In most states, false advertising and unfair competition statutes define economic injury for standing purposes in terms of lost sales or harm to business reputation.¹⁷ Applying this definition of economic injury means that consumers generally lack standing to bring private actions against retailers. This nearly exclusive focus on competitors leaves most consumers unfairly cut off from the civil justice system.¹⁸

Part II examines the facts of *Hinojos* and considers the court's reasoning. Part III frames the importance of consumer protection law by examining consumer behavior and the public policy principles underlying the nationwide prohibition on false advertising. Part IV reviews the statutory framework of California's FAL and UCL—

11. *Id.*

12. 246 P.3d 877 (Cal. 2011).

13. *Hinojos*, 718 F.3d at 1106–07.

14. *Id.*

15. See *infra* Part III.A.

16. See Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 16 (1992) (stating that standing under § 43(a) of the Lanham Act, the federal cause of action for false advertising, is granted exclusively to competitors).

17. See CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 3 (2009).

18. See *infra* Part III.B.

under which the Ninth Circuit decided *Hinojos*—as well as the political efforts to narrow consumer standing under those laws. Part V then analyzes the significance of the Ninth Circuit’s interpretation of the standing requirements by comparing them to those under the federal false advertising statute¹⁹ and other states’ statutes. Part VI concludes by predicting the ultimate outcome in *Hinojos* and its impact on future unfair competition and false advertising cases, and ultimately suggests that federal law adopt the Ninth Circuit’s approach.

II. STATEMENT OF THE CASE

A. Facts

On May 6, 2010, Plaintiff Antonio Hinojos purchased hundreds of dollars of apparel and luggage at Defendant Kohl’s Corporation’s (“Kohl’s”) store in Glendora, California.²⁰ Advertisements and in-store labeling on several of the purchased items indicated discounts of 32 to 50 percent off of their “original” prices.²¹ When Hinojos learned that Kohl’s had heavily inflated the so-called “original” prices and that these prices were never representative of the prevailing market rates for the goods, he initiated litigation against Kohl’s for false advertising and unfair competition in California Superior Court.²² Kohl’s removed the case to federal court.²³

Before the district court, Hinojos alleged that Kohl’s deceptive sale prices were a material factor in his decision to buy the goods from Kohl’s, as opposed to another retailer.²⁴ He also cited California statutes prohibiting retailers from representing sale prices “as a former price of any advertised thing, unless the alleged former price was the prevailing market price . . . within three months . . . preceding the publication of the advertisement.”²⁵ Hinojos further argued that purchases made under false pretenses—as created by

19. 15 U.S.C. § 1125 (2012).

20. Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss at 3, *Hinojos v. Kohl’s Corp.*, No. CV 10-07590 ODW (AGRx), 2010 WL 4916647 (C.D. Cal. Dec. 1, 2010), *rev’d*, 718 F.3d 1098 (9th Cir. 2013).

21. Plaintiff-Appellant’s Opening Brief at 8, *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098 (9th Cir. 2013) (No. 11-55793).

22. *Hinojos*, 718 F.3d at 1102.

23. *Id.*

24. *Id.*

25. CAL. BUS. & PROF. CODE § 17501 (West 2013); *Hinojos*, 718 F.3d at 1102–03.

Kohl's advertisements and in-store signage—constituted “lost money or property” for the purposes of standing under California’s False Advertising Law and Unfair Competition Law.²⁶ The district court dismissed Hinojos’s complaint, holding that the alleged material misrepresentations were inadequate to establish sufficient economic injury to satisfy the standing requirement because Hinojos knew Kohl’s offering price and accepted it.²⁷ Hinojos therefore got what he paid for.²⁸ The district court also distinguished *Hinojos* from *Kwikset*, holding that consumer standing did not apply when the advertisement pertained to misleading price information, as opposed to a product’s substantive qualities.²⁹ Hinojos appealed to the Ninth Circuit and successfully argued for reinstatement of his complaint.³⁰

B. The Ninth Circuit’s Reasoning

On appeal, the Ninth Circuit rejected the district court’s interpretation of *Kwikset*.³¹ In *Kwikset*, the plaintiff, a buyer of locksets advertised as “Made in U.S.A.,” sued the seller upon learning that the locksets contained foreign parts and were partially manufactured in Mexico.³² As in *Hinojos*, the complaint alleged violations of the California Business and Professions Code (“Code”) for advertising false information as to the origin and composition of the goods in question.³³ The trial and lower appellate courts interpreted amendments to the Code as a broad limitation on private consumer standing, except where the consumer suffered a “sufficient” economic injury in the form of “lost money or property as a result of the unfair competition.”³⁴ Because the *Kwikset* buyer did not allege that the price he paid for the locksets was excessive or that the locksets themselves were defective, the lower courts found deception to be the sole injury, and thus insufficient to establish standing.³⁵ The California Supreme Court reversed, finding that,

26. *Hinojos*, 718 F.3d at 1101–02.

27. *Id.* at 1105.

28. *Id.* at 1102.

29. *Hinojos v. Kohl’s Corp.*, No. CV10-07590 ODW (AGRx), 2010 WL 4916647, at *4 (C.D. Cal. Dec. 1, 2010), *rev’d*, 718 F.3d 1098 (9th Cir. 2013).

30. *Hinojos*, 718 F.3d at 1103, 1108.

31. *Id.* at 1105.

32. *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 882 (Cal. 2011).

33. *Id.* at 881.

34. CAL. BUS. & PROF. CODE § 17204 (West 2013).

35. *Kwikset*, 246 P.3d at 881.

when deceptive sales techniques have a material effect on the consumer's decision to purchase, the money spent purchasing the product in question may be deemed "lost" for the purposes of satisfying the standing requirement.³⁶

The district court in *Hinojos* narrowly construed the holding in *Kwikset* to misrepresentations of production, composition, and origin.³⁷ The Ninth Circuit disagreed, concluding that "*Kwikset* cannot be so easily limited."³⁸ The Ninth Circuit reasoned that consumers care not only about composition and origin of products, but also pricing information regarding those products, including their "original" price and the extent of an apparent discount or bargain during a sale.³⁹ In support of this proposition, the court cited academic literature indicating that price statements convey valuable "information about the product's worth . . . and prestige."⁴⁰ Accordingly, the Ninth Circuit held that a consumer who alleges a false sale and purported "bargain" as material facts in his decision to purchase the product in question has, in fact, been deceived in a commercial setting; therefore, the money spent on the purchase constitutes an economic injury sufficient to establish standing under the FAL and UCL.⁴¹

The Ninth Circuit also disagreed with the district court's conclusion that Hinojos lacked standing because he received the benefit of the bargain.⁴² Under the district court's view, Hinojos lacked standing because he had known the offering price, made a decision based on that price, and then kept the goods.⁴³ The Ninth Circuit noted, however, that a consumer only receives the benefit of the bargain when he has full command of the facts that convince him

36. *Id.* at 891–92.

37. *Hinojos v. Kohl's Corp.*, No. CV 10-07590 ODW (AGRx), 2010 WL 4916647, at *4 (C.D. Cal. Dec. 1, 2010), *rev'd*, 718 F.3d 1098 (9th Cir. 2013).

38. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1105 (9th Cir. 2013).

39. *Id.* at 1105–06.

40. *Id.* at 1106 (citing Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Informative or Deceptive?*, 11 J. PUB. POL'Y & MKTG. 52, 55 (Spring 1992)).

41. The court bolstered its reasoning by citing academic literature that explained the psychological effect that perceived deals have on most consumers. *Hinojos*, 718 F.3d at 1106 (citing Grewal & Compeau, *supra* note 40, at 56). Such literature helps explain why consumer protection laws should be construed to the consumer's benefit. *See infra* Part III.A.

42. *Hinojos*, 718 F.3d at 1107.

43. *Id.*; *Hinojos v. Kohl's Corp.*, No. CV 10-07590 ODW (AGRx), 2010 WL 4916647, at *3–4 (C.D. Cal. Dec. 1, 2010), *rev'd*, 718 F.3d 1098 (9th Cir. 2013).

to make the purchase.⁴⁴ Hinojos alleged that Kohl's misrepresentations of deep discounts were material to his decision to purchase, as he apparently had lacked the full and complete knowledge that would allow him to receive the benefit of the bargain.⁴⁵ The Ninth Circuit therefore found the complaint's allegation of materiality sufficient to satisfy the standing requirement at the pleading stage.⁴⁶

Drawing strongly on legislative intent and the public policies underlying consumer protection law,⁴⁷ the Ninth Circuit ultimately expressed concern that the district court's narrow interpretation of the FAL, UCL, and *Kwikset* would "bring to an end private consumer enforcement of bans" on false sales practices.⁴⁸ Delineating Prop. 64's stated intent of minimizing frivolous lawsuits while still protecting the right of private individuals to sue when they *actually* suffer from deceptive commercial practices,⁴⁹ the court firmly stated that "price advertisements matter."⁵⁰ For the aforementioned reasons, the Ninth Circuit concluded that Hinojos had standing to sue Kohl's for false advertising and unfair competition.⁵¹

III. ANALYSIS

The Ninth Circuit's interpretation of the FAL and UCL's standing requirements balanced the concern for protecting consumer rights with a faithful interpretation of the legislative intent behind Prop. 64 and the plain text of the amendments.⁵² In applying a materiality standard, the court signaled greater receptiveness to consumer claims and a judicial commitment to consumer protection against deceptive advertising—at least in California.⁵³ Although the holding is limited to California, the case may actually bear greater significance nationally, especially when one considers the retraction

44. *Hinojos*, 718 F.3d at 1107.

45. *See id.*

46. *Id.* at 1109.

47. *See infra* Part III.A.

48. *Hinojos*, 718 F.3d at 1107 (quoting *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 891 (Cal. 2011)).

49. PROP. 64 § 1(d).

50. *Hinojos*, 718 F.3d at 1107.

51. *Id.* at 1109.

52. *See id.* at 1104.

53. *Id.* at 1106–07.

of consumer standing rights under federal and state laws over the past two decades.⁵⁴

The analysis begins with an explanation of the public policy rationales underpinning consumer protection in order to home in on why consumers deserve the right to redress deception in commercial transactions (just as business competitors' have a right to redress unfair competition). The analysis then turns to the statutory framework of California's consumer protection law to demonstrate the reasonableness of the Ninth Circuit's statutory interpretation.

A. Why Consumer Protection Laws Matter and Why Consumers Should Have Standing to Enforce Them

An understanding of why judicial action advancing consumer protection is important requires an astute assessment of consumer behavior and the effect that patently false or misleading information has on consumers.

1. Consumer Behavior

Consumers love a deal. For many, the thrill of finding a good deal is comparable to the feeling of accomplishment associated with achieving a goal.⁵⁵ Experiential evidence and empirical data show that, when presented with a sale or confronted with strategic price-framing techniques, consumers are more likely to make a purchase, even when the bottom line has the same, or even less, benefit to

54. See Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1375 (2011) ("Despite the breadth of the language in the Lanham Act, which provides a cause of action to 'any person who believes that he or she is or is likely to be damaged' by a violation of section 43(a), courts have never given those words a literal reading. . . . [C]ourts simply excluded consumers from the class the law protected, allowing only competitors to sue."); see also BeVier, *supra* note 16, at 16 ("The consumer . . . is almost never the plaintiff in section 43(a) litigation. The plaintiff, rather, is usually the defendant's competitor."); HOT COFFEE (HBO 2011) ("Businesses use a number of devices to keep the public out of courts."); Stephanie Mencimer, *Consumer Protection's Citizens United*, MOTHER JONES (Nov. 9, 2010, 4:00 AM), <http://www.motherjones.com/politics/2010/11/att-concepcion-chamber-of-commerce> (noting that in 2005, the Chamber of Commerce "succeeded in winning legislation that makes it much harder to bring such cases in state courts").

55. With millions of users and even more daily sales, the proliferation of flash sale websites like Gilt and Groupon, which was the second fastest company ever to reach a one billion dollar valuation (surpassed only by YouTube), attest to the consumers' love of "steals and deals." Christopher Steiner, *Meet the Fastest Growing Company Ever*, FORBES (Aug. 12, 2010, 3:40 PM), <http://www.forbes.com/forbes/2010/0830/entrepreneurs-groupon-facebook-twitter-next-web-phenom.html>.

consumers.⁵⁶ A recent example of this occurrence may be observed in JC Penney's attempt to simplify pricing by eliminating sales and promotions and instead advertise "everyday low prices."⁵⁷ Although the price of merchandise remained stable, JC Penney's sales declined by 25 percent less than one year after implementing its sales plan, a loss of several billion dollars.⁵⁸ In 2006, Macy's attempted a similar plan to "retrain" customers away from the psychological game of sales and discounts.⁵⁹ However, for consumers, the "thrill of getting a great deal, even if it's an illusion," was too great, and both companies quickly abandoned their plans to stem the tide of dramatically falling sales.⁶⁰

Empirical studies show that "[t]he use of ambiguous and potentially misleading jargon increases an advertisement's trustworthiness. . . . Such contextual effects can be particularly salient when consumers pay less attention to the content validity and focus more on the contextual cues."⁶¹ Applying this notion to a false sales context, a consumer is more susceptible to believe a misleading price statement based on contextual cues, such as higher "original" prices or a purportedly high discount rate when that consumer has not obtained a complete set of information as to the prevailing market price of a good, and accordingly cannot assess the "content validity."⁶² Given the widespread recognition of consumers' love of deals, manipulating that aspect of human nature—as retailers often do—should be considered contrary to public policy. Correspondingly, undercutting consumers' ability to seek legal redress for retailers' deceptive practices implicitly allows such practices to continue and should likewise be viewed as contrary to public policy.

56. Stephanie Clifford & Catherine Rampell, *Sometimes, We Want Prices to Fool Us*, N.Y. TIMES, Apr. 14, 2013, at BU1.

57. *Id.*

58. *Id.*

59. *Id.* ("Penney recognized that human trait and backtracked on its pricing policy, offering coupons and running weekly sales again But here's the thing: customers weren't actually paying less.").

60. *Id.*

61. Guang-Xin Xie & David M. Bousch, *How Susceptible Are Consumers to Deceptive Advertising Claims? A Retrospective Look at the Experimental Research Literature*, 11 MKTG. REV. 293, 302 (2011).

62. *Id.*

2. Public Policy and the Goals of False Advertising Laws

Evidence shows that consumers make purchasing decisions based on symbols such as brand names and advertisements. Accordingly, laws prohibiting the misleading use of symbols and trade information recognize the “commercial magnetism” of such symbols.⁶³ A broadly accepted economic principle states that “[a] perfect market demands perfect enlightenment by those who buy and sell.”⁶⁴ Such enlightenment may be effectively achieved through consumer protection. Fundamentally, consumer protection law encourages consumers to make choices freely and confidently in the marketplace,⁶⁵ ensuring the market’s continued strength⁶⁶ for the benefit of consumers and competitors alike.⁶⁷

Given consumers’ reliance on advertising from sellers,⁶⁸ ensuring truth in advertising is of critical importance in fulfilling the “perfect enlightenment” precept. Advertisements, however, are inherently a mix of persuasion and information, often heavily weighted toward persuasion.⁶⁹ Accordingly, from an “above the trees” perspective, unfair competition and false advertising laws recognize the effect that commercial deception can have on consumers and seek to protect businesses and individuals alike from

63. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942). This case specifically pertains to trademarks, but the sentiment is equally applicable in the false advertising context. Arguably, relative price has as much commercial magnetism as brand symbols.

64. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1168–69 (1948); *see also* BeVier, *supra* note 16, at 5 (“Under conditions of perfect competition, there is no advertising because consumers are assumed to be endowed at the outset with perfect information and thus have no need for it. In the imperfect real world though, consumers have imperfect knowledge.”).

65. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. a (1995).

66. Richard F. Dole, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485, 506 (1967); *see also* Michael R. Baye, Director, Bureau of Econ., Fed. Trade Comm’n, Speech at Bentley College: The Economics of Consumer Protection, Antitrust, and Policy 23 (Apr. 24, 2008) (transcript available at <http://www.ftc.gov/speeches/baye/080424bentley.pdf>) (“For competition to thrive consumers must receive accurate information about products and services.”).

67. Baye, *supra* note 66, at 4, 24.

68. *See* Brown, *supra* note 64, at 1168.

69. *Id.* at 1169; *see also* Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 115 (2012) (quoting SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET 27 (1989)) (“Marketing is designed not merely to give information about products consumers already know they want but to ‘make people want many other things’ In the false advertising context, the Federal Trade Commission (FTC) has candidly acknowledged this persuasive function.”).

the consequences of such deception.⁷⁰ More narrowly, a Federal Trade Commission survey reflects how vulnerable consumers are in terms of likelihood of suffering from deception in commercial transactions.⁷¹ The survey discloses that more than thirty million American adults report being victims of fraud in commercial contexts.⁷² While the survey concerns consumer fraud nationally, state legislatures are empowered to address this problem and protect consumers from misinformed decision making, and to rectify the consequences of consumer fraud.

The Ninth Circuit also explained the importance of consumer protection from false advertising. Specifically, the Ninth Circuit remarked that a “deceived bargain hunter [obviously] suffers” when his expectations and the realities of economic value are misaligned.⁷³ Moreover, the Ninth Circuit’s dual stress on the deception and its connected injury recognizes precisely why protecting consumers from deceptive trade practices is an important role the judiciary should play. The Ninth Circuit’s analysis highlights how consumers shopping in California are affected by violations of California’s UCL and FAL. The analysis further emphasizes *why*—when their injury is so obvious—consumers should be able to seek redress from sellers who engage in practices that are dishonest and contrary to public values.⁷⁴

B. The Ninth Circuit’s Balanced Reading of California’s Unfair Competition and False Advertising Laws

With the realities of consumer behavior and the policy of protecting consumers in mind, the Ninth Circuit set out to interpret the statutory standing requirements at issue in *Hinojos* fairly and

70. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) (discussing that the impact of symbols on consumers as a basis for prohibitions on false advertising and deceptive use of trademarks); *see also* Brown, *supra* note 64, at 1167 (stating that private disputes on deceptive use of trade symbols “touch[es] the public welfare,” thus elucidating the basis prohibiting false advertising).

71. FED. TRADE COMM’N, CONSUMER FRAUD IN THE U.S.: SECOND FTC SURVEY S-1 (2007) [hereinafter FTC SURVEY].

72. *Id.*

73. *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1106 (9th Cir. 2013).

74. *See* Tawnya Wojciechowski, *Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 SW. U. L. REV. 213, 232 (1994).

reasonably.⁷⁵ After all, these manipulative tactics are illegal in most states and the real issue is whether consumers have standing to hold liable the businesses that engage in such practices.⁷⁶

To determine whether the court correctly decided the standing issue, it is necessary to review the statutory framework within which Hinojos's claim existed. First, California's UCL prohibits all "unfair or fraudulent business act[s] or practice[s] and unfair, deceptive, untrue or misleading advertising"⁷⁷ Specifically in the context of false sales, California's FAL provides that "[n]o price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price . . . within three months next immediately preceding the publication of the advertisement"⁷⁸

In order to sue for violations of these laws, both the UCL and FAL adhere to the standing requirements defined in section 17204.⁷⁹ Section 17204 allows just two avenues to satisfy the standing requirement.⁸⁰ Specifically, the complaint must be made by (1) a government actor "in the name of the people of the State of California *upon their own complaint*," or (2) "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."⁸¹ Alleged violations of the UCL or FAL provide the foundation for redressing unfair competition and false advertising in California.⁸² Each statute was heavily referenced in

75. *Hinojos*, 718 F.3d at 1105–07.

76. See Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L.J. 125, 126 (1987) (stating that the consumer protection movement flourished in the 1960s, culminating with the enactment of various deceptive trade practices statutes by the early 1970s).

77. CAL. BUS. & PROF. CODE § 17200 (West 2013).

78. *Id.* § 17501.

79. *Id.* § 17200; *id.* § 17501.

80. *Id.* § 17204.

81. *Id.* (emphasis added).

82. See Arkin, *supra* note 6, at 157 ("17200 effectuates its protective public policy purpose by broadly defining unfair competition under what are called 'the five prongs': (1) Unlawful conduct; (2) Unfair conduct; (3) Fraudulent conduct; (4) Deceptive advertising; and (5) Violations of 17500. Virtually all Unfair Competition Law actions are primarily predicated on one or more of the first three prongs, i.e., that the conduct is unlawful, unfair or fraudulent." (internal citations omitted)); see also Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 13 (2010) ("These statutes are typically very short, broadly prohibiting conduct that is 'false or deceptive' and granting private parties very broad standing to sue. Importantly, these statutes often overlap. California, for example, has both an Unfair Competition Law modeled after the FTC Act and an Unfair Practices Act that tracks the Uniform Deceptive Trade Practices Act.").

*Kwikset and Hinojos.*⁸³

Section 17204 was last amended in 2004 following the approval of Prop. 64 through the California initiative process.⁸⁴ The campaign to enact Prop. 64 and its consequences are discussed in greater detail in Part IV, but for now it is important to note that the amendment to section 17204 eliminated standing in “the general public” and allowed standing only to a “person who has suffered injury in fact and has lost money or property as a result of the unfair competition.”⁸⁵ Adding the requirement of “lost money or property” negated the traditional presumption of emotional injury caused by fraudulent conduct.⁸⁶ Amending sections 17200 and 17500 in accordance with Prop. 64 considerably restricted who had standing to sue, thereby limiting consumers’ ability to redress false advertising on multiple levels.⁸⁷ First, as a result of the statutory restrictions placed on individuals who fall victim to false advertising, the Prop. 64 amendments to the UCL and FAL compel consumers to rely heavily on public officials to redress deceptive business practices.⁸⁸

However, while the law refocused consumer protection efforts toward public officials, the amendment included no additional resources or powers to assist those officials in addressing consumer claims of deception more effectively.⁸⁹ In fact, “severe budgetary cut-backs . . . prevent many actions against false advertisers from being investigated” by the federal and state officials.⁹⁰ The lack of government resources to respond to consumer claims, much less to

83. *See generally* *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098 (9th Cir. 2013) (holding that Hinojos did have standing to sue under the UCL and FAL); *see generally* *Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011) (holding that consumers who allege that they were deceived into purchasing a product due to the misrepresentation of a product’s label have “lost money or property” as required by California Proposition 64 and have standing to sue under the UCL and FAL).

84. *See infra* Part IV.

85. CAL. BUS. & PROF. CODE § 17204 (West 2013); *id.* § 17204 (West 2004), *amended by* PROP. 64 § 3 (2004).

86. *See generally* *Klass*, *supra* note 4 (discussing the law of deception and how it inherently punishes parties for their intentional acts).

87. *Proposition 64: Limits on Private Enforcement of Unfair Business Competition Laws. Initiative Statute.*, CAL. ONLINE VOTER GUIDE (Feb. 10, 2006), <http://www.calvoter.org/voter/elections/2004/props/prop64.html> (The official Summary of Prop. 64 states that, if enacted, the amendments to UCL and FAL “authorize only California Attorney General or local public officials to sue on behalf of general public to enforce unfair business competition laws.”).

88. *Id.*

89. *Id.*

90. Wojciechowski, *supra* note 74, at 232.

actually litigate them, underscores the importance of providing consumers the ability to seek redress for harms caused by deceptive business practices themselves.

Moreover, when a consumer's financial injury from a falsely stated "sale" price is relatively small, the heightened standing requirement places another barrier between the consumer and justice. When the cost of litigation is so great, additional burdens tend to discourage wronged consumers from suing on their own, causing them to either suffer a permanent injury or wait for public officials to take an interest in their case.⁹¹

Moreover, section 17204 requires a government actor to bring the complaint on his own accord.⁹² Accordingly, unless a consumer can satisfy the requirement of injury in fact and has sufficient resources to sue a large retailer like Kohl's, said consumer must rely on government attorneys to obtain a remedy.⁹³ Given chronic understaffing and lack of resources, this path toward relief substantially limits an individual consumer's ability to obtain redress for false advertising and unfair competition.⁹⁴

Another barrier to consumer standing has been judicial interpretation of section 17204's "lost money or property" clause. Prior to *Kwikset*, the prevailing judicial interpretation of the aforementioned clause was that loss needed to be in the form of lost sales or goodwill.⁹⁵ This interpretation focused on harm that competitors suffered due to false advertising, rather than how commercial deception injured consumers financially and

91. See J. Shahar Dillbary, *Trademarks as a Media for False Advertising*, 31 CARDOZO L. REV. 327, 339 (2009) (explaining that consumer recovery for false advertising under private causes of action is unlikely because "consumers rarely have the means and resources to detect fraud and recover damages" and the high cost of litigation often deters consumer claims); see also Dale A. Reinholtsen, *Role of California's Attorney General and District Attorneys in Protecting the Consumer: Substantive Areas of Action*, 4 U.C. DAVIS L. REV. 35, 37, 54 (1971) ("Harsh economic realities create numerous practical barriers which confront the consumer when he seeks to bring a private action.").

92. CAL. BUS & PROF. CODE § 17204 (West 2013).

93. *Id.*

94. See Reinholtsen *supra* note 91 (contending that the paths to relief provided under the UCL "may be somewhat illusory for many consumers [. . .] when the economic realities of the marketplace are recognized"); see also Homer Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 41 (1969) (discussing the obstacles consumers face in pursuing legal action).

95. See *Hall v. Time Inc.*, 70 Cal. Rptr. 3d 466, 467, 469, 471–72 (Ct. App. 2008); see also *Peterson v. Cellco P'ship*, 80 Cal. Rptr. 3d 316, 321 (Ct. App. 2008) (explaining the requirements for standing under section 17204).

emotionally.⁹⁶ Since consumers do not have goodwill or sales to lose, this interpretation left the vast majority of consumers who were not part of a class action or represented by a government official without a path for redress.⁹⁷

Another interpretation of section 17204's injury requirement asserted that an injury of lost money or property must "exclude situations in which a person receives the benefit of the bargain."⁹⁸ When the "bargain" is considered mere payment of the stated price of a good or service, and the "benefit" is retained when the consumer chooses to purchase based on said price,⁹⁹ the bar for a consumer not receiving the benefit of the bargain is impracticably high.¹⁰⁰ Such a narrow interpretation of benefit and bargain essentially meant that a consumer received "the benefit of the bargain" so long as the seller did not literally lie to him regarding the price that he expected to pay—and actually paid—for the product in question. This interpretation ignores the empirically proven effect that purported "deals" have on consumers' decision whether to purchase a product, as well as the fact that a consumer makes purchasing decisions by comparing current prices to original prices, not just by evaluating the bottom-line.¹⁰¹

Moreover, construing "injury" to mean only a tangible financial loss that is strictly associated with the purchase in question overlooks the likelihood that a deceived consumer has already incurred—or would incur—additional transaction costs in the process of rectifying

96. See *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 883 (Cal. 2011).

97. See *Hall*, 70 Cal. Rptr. 3d at 470 ("The voters' intent in passing Proposition 64 and enacting the changes to the standing rules in Business and Professions Code section 17204 was unequivocally to narrow the category of persons who could sue business under the UCL."). See generally *Hinojos v. Kohl's Corp.*, No. CV10-07590 ODW (AGRx), 2010 WL 4916647 (C.D. Cal. Dec. 1, 2010), *rev'd*, 718 F.3d 1098 (9th Cir. 2013) (concluding that the plaintiff lacked standing to sue because he had not lost money or property).

98. *Hinojos v. Kohl's Corp.*, No. CV10-07590 ODW (AGRx), 2010 WL 4916647, at *2 (C.D. Cal. Dec. 1, 2010), *rev'd*, 718 F.3d 1098 (9th Cir. 2013) (citing cases in the Ninth Circuit where a consumer lacked standing when he retained merchandise, even if not of the character for which the consumer bargained); see also *Johnson v. Mitsubishi Digital Elecs. Am. Inc.*, 365 Fed. App'x 830, 832 (9th Cir. 2010) ("If one gets the benefit of the bargain, he has no standing under the UCL."); *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927, 2010 WL 94265, at *2 (N.D. Cal. Jan. 6, 2010).

99. See *Hinojos*, 2010 WL 4916647, at *3. The district court followed this presumption, stating that because *Hinojos* knew the price he was paying and chose to follow through with the sale, he received the benefit of the bargain.

100. See *id.*

101. See *Clifford & Rampell*, *supra* note 56; *supra* Part III.A.

the deception on his own.¹⁰² The possible transaction costs that a consumer could incur in attempting to rectify the seller's deception include return trips to a store or potential loss of value between the purchase price and the resale value of the product.¹⁰³ For example, in the latter scenario, if the consumer attempts to return the product and thereby loses "the benefit of the bargain," courts may conclude that the initial deception was remedied when the consumer returned the product.¹⁰⁴ Such an interpretation would yet again leave consumers as the victims of false advertising without a means of suing for the seller's deception and UCL or FAL violation.

A final interpretation of the standing requirement for consumers under section 17204 assumed that the plaintiff must be entitled to restitution.¹⁰⁵ However, the *Kwikset* court observed that this interpretation conflated a remedies issue with a procedural issue.¹⁰⁶ The court noted that this interpretation of Prop. 64 is illogical, for it prematurely speculates on the merits of a case before deciding whether the plaintiff even has standing.¹⁰⁷

The California Supreme Court considered the variety of interpretations applied to the "lost money or property" clause of section 17204, and ultimately landed on the broadest interpretation of standing where consumer protection statutes were involved.¹⁰⁸ Notwithstanding the challenges that Prop. 64 placed on consumers, the *Kwikset* court concluded that allowing standing for private consumers who truthfully allege that a product's deceptive labeling

102. See *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 893 (Cal. 2011); see also *Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295, 299 (Cal. 2009) (discussing how the phrase "any damage" in the California Civil Code "may encompass harms other than pecuniary damages, such as certain types of transaction costs").

103. Cars, for example, lose 10 to 20 percent of their value annually, and even new cars depreciate by an average of 11 percent within the first minute they are driven off the dealer's lot. See *Depreciation Infographic: How Fast Does My New Car Lose Value?*, EDMUND'S (Sept. 24, 2010), <http://www.edmunds.com/car-buying/how-fast-does-my-new-car-lose-value-infographic.html>. Under the benefit-of-the-bargain interpretation, a consumer attempting to remedy deception encountered when purchasing a new car stands to lose thousands of dollars due to diminished resale value alone.

104. See *Hinojos*, No. CV10-07590 ODW (AGRx), 2010 WL 4916647, at *3 (C.D. Cal. Dec. 1, 2010), *rev'd*, 718 F.3d 1098 (9th Cir. 2013).

105. *Kwikset*, 246 P.3d at 894–95.

106. *Id.* at 895.

107. See *id.* at 894–95, for a discussion of *Clayworth v. Pfizer Inc.*, 233 P.3d 1066, 1087–88 (Cal. 2010), where the California Supreme Court found plaintiff's inability to demonstrate "compensable losses or entitlement to restitution" immaterial to the validity of standing under Section 17204.

108. See *id.* at 881.

was material to their decision to purchase is consistent with the meaning of Prop. 64 and “preserv[es] for *actual* victims of deception . . . the ability to sue and enjoin such practices.”¹⁰⁹ This determination paved the way for the even more inclusive view of standing articulated in *Hinojos*.

IV. CONSUMER STANDING IN A POLITICAL CONTEXT: THE CAMPAIGN FOR PROP. 64

As the *Hinojos* court observed, most consumers have been motivated to make purchases “because [a] proffered discount seemed too good to pass up,”¹¹⁰ despite their awareness that retailers “have an incentive to lie to their customers” about sale prices.¹¹¹ This shared experience may well be the reason why the issue of standing in false advertising and unfair competition cases strikes a chord with so many consumers.

Also, the long-held right to seek redress for these deceptive business practices in court was curtailed only recently.¹¹² Until November 2004, *Hinojos*’s ability to sue Kohl’s would only have been limited by his ability to write a well-pleaded complaint.¹¹³ This is because any private consumer had standing under the FAL as a member of the general public.¹¹⁴ However, as mentioned above, the requirements for standing changed when voters passed Prop. 64.¹¹⁵

The proponents of Prop. 64 asserted that, by adding a basic requirement that individual plaintiffs demonstrate an injury-in-fact, the civil justice system and California businesses could avoid

109. *Id.*

110. *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1101 (9th Cir. 2013); *see also* FTC SURVEY, *supra* note 71 (discussing the various ways consumers are most frequently defrauded).

111. *Hinojos*, 718 F.3d at 1101.

112. CAL. ONLINE VOTER GUIDE, *supra* note 87.

113. Prior to the passage of Prop. 64, California Business & Professions Code section 17204 provided that “[a]ctions for relief pursuant to this chapter shall be . . . by a person acting for the interests of itself, its members or the general public.” CAL. BUS. & PROF. CODE § 17204 (West 2004). Prop. 64 replaced “acting for the interests of itself, its members or the general public” with “who has suffered injury in fact and has lost money or property as a result of the unfair competition,” thus imposing stricter pleading requirements on consumers. *See* Roxana Mehrfar, *Redefining Commonality for Consumer Class Actions Under California Business and Professions Code Sections 17200 and 17500*, 44 LOY. L.A. L. REV. 353, 375 (2010) (“[C]omplaints alleging violations of the UCL fraud prong are subject to the ordinary pleading standard—a short and plain statement alleging facts upon which relief can be granted.”).

114. CAL. BUS. & PROF. CODE § 17204 (West 2004) (version prior to amendment due to Prop. 64’s approval).

115. CAL. ONLINE VOTER GUIDE, *supra* note 87.

frivolous “shakedown lawsuits.”¹¹⁶ Proponents of Prop. 64 sought to end these so-called frivolous lawsuits against businesses, which “corporate interests . . . long attacked as an invitation for unscrupulous attorneys to file . . . against businesses.”¹¹⁷ However, the proponents of Prop. 64 failed to also convey to voters that the amended law provided no mechanism to weed out frivolous claims from legitimate ones.¹¹⁸ Thus, while the amendments preserved prohibitions on deceptive pricing and other unfair business tactics, they left even the innocent victims (and legitimate claimants) of consumer fraud unable to obtain redress for clear violations of the FAL and UCL.

While this consequence of the amendment is clearly misaligned with the public policy goals of consumer protection,¹¹⁹ in fact it was the proponents’ goal.¹²⁰ Ironically, the Prop. 64 proponents’ primary campaign strategy involved deceiving voters who, like consumers, rely on advertising and contextual cues to make decisions. The deception in the “Yes on 64” campaign stemmed largely from the appearance of support from so-called grassroots organizations called “Californians Against Lawsuit Abuse” and “Yes on 64—Californians to Stop Shakedown Lawsuits.”¹²¹ These groups were primarily funded by a wide array of business interests, including several health insurance and pharmaceutical companies, associations of car dealers and manufacturers, “Big Tobacco,” and a home mortgage company that is now defunct as a result of its unscrupulous

116. See Marc Lifsher, *Prop. 64 Backers Fight for Attention*, L.A. TIMES, Nov. 1, 2004, <http://articles.latimes.com/2004/nov/01/business/fi-prop641>.

117. Marc Lifsher & Myron Levin, *Citing Prop. 64, Firms Seek to Kill Lawsuits*, L.A. TIMES, Dec. 27, 2004, <http://articles.latimes.com/2004/dec/27/business/fi-prop6427>; see PROP. 64, § 1, SUBD. (C) 1(c) [‘Findings and Declarations of Purpose’] (stating that the purpose of narrowing the UCL’s standing requirement through the amendment was because of “[f]rivolous unfair competition lawsuits [that] clog our courts[,] . . . cost taxpayers[,] . . . and . . . threaten[] the survival of small businesses”).

118. See *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 894 n.21 (Cal. 2011) (“[N]othing suggests the voters contemplated eliminating statutory standing for consumers actually deceived by a defendant’s representations.”).

119. See *supra* Part III.A.

120. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 2.1 (2013); see also Lifsher & Levin, *supra* note 117 (stating that the authors of Prop. 64 intended to make “it harder for businesses to be sued over deceptive advertising and other fraudulent practices under the law”).

121. See Lifsher, *supra* note 5. See generally *Mission and History*, CALIFORNIA CITIZENS AGAINST LAWSUIT ABUSE (2012), <http://www.cala.com/about-cala> (explaining the mission of CALA as a nonpartisan grassroots organization seeking to reduce lawsuit abuse).

business dealings.¹²² Yet, proponents' campaign materials suggest that their membership is comprised mostly of individuals and small businesses.¹²³ The United States Chamber of Commerce, the nation's largest business association, made the third largest donation and spent nearly half a million dollars in support of Prop. 64's passage.¹²⁴ The Chamber of Commerce was simultaneously involved in comparable state-level efforts to limit individuals' standing against businesses across the country.¹²⁵

Opponents of Prop. 64 countered that this amendment to the UCL and FAL would dismantle efforts to protect consumers against businesses that take advantage of consumers' information gap.¹²⁶ The campaign stressed that the amendment "made it harder for businesses to be sued over deceptive advertising and other fraudulent practices under the law."¹²⁷ Opponents also argued that, while some private claims may have been frivolous, the great majority of claims arose from consumers feeling wronged by a business's deception, and not consumers playing "jackpot justice" to "shakedown" business owners.¹²⁸ Nonetheless, the opponents' arguments were drowned out by the far better financed campaign in support of Prop. 64.¹²⁹

122. FOLLOW THE MONEY, *supra* note 2 (featuring a table of the proponents top twenty contributors). Countrywide Home Loans donated \$200,000 to the "Yes on 64" campaign in 2004, when it was the largest mortgage lender in the United States. *Id.* By 2009, Countrywide had gone under and its officers were under investigation for civil and criminal fraud charges. Press Release, Sec. & Exch. Comm'n, Former Countrywide CEO Angelo Mozilo to Pay SEC's Largest-Ever Financial Penalty Against Public Company's Senior Executive (Oct. 15, 2010) (on file with Sec. & Exch. Comm'n).

123. CALIFORNIA CITIZENS AGAINST LAWSUIT ABUSE, *supra* note 121.

124. FOLLOW THE MONEY, *supra* note 2 (listing a donation by the U.S. Chamber of Commerce to Yes on 64: Californians to Stop Shakedown Lawsuits for \$495,000).

125. *See* HOT COFFEE, *supra* note 54.

126. Richard Holober, *An Opposing View: Prop. 64*, SFGATE, Oct. 26, 2004, <http://www.sfgate.com/default/article/AN-OPPOSING-VIEW-PROP-64-Protect-consumers-2678773.php>.

127. *See* ARKIN, *supra* note 6, at 156 (discussing the Prop. 64 campaign's emphasis on frivolous and extortive lawsuits); *see also* Lifsher & Levin, *supra* note 117 (stating that "[t]he ballot measure made it harder for businesses to be sued over deceptive advertising and other fraudulent practices under the law").

128. *Id.*

129. FOLLOW THE MONEY, *supra* note 2 (stating that the proponents, led by "Yes on 64," raised \$20,551,881. The top three contributors made the following campaign contributions to "Yes on 64": California Motor Car Dealers Association—\$5,251,072; Alliance of Automobile Manufacturers California—\$1,500,000; US Chamber of Commerce. The opponents of Prop. 64 received \$3,206,391 in donation—its largest from Consumer Attorneys of California in the amount of \$763,700.); *see also* Eric Lipton, Mike McIntire & Don Van Natta, Jr., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y. TIMES, Oct. 22 2010, at A1.

After outspending the opponents of Prop. 64 by more than six to one,¹³⁰ the “Yes on 64” campaign helped Prop. 64 pass with 59 percent of the vote.¹³¹ Until *Hinojos*, Prop. 64 effectively shut courthouse doors to the vast majority of consumers, including those who were demonstrably injured by a business’ illegal, deceptive practices.

V. COMPARING CALIFORNIA’S STANDING REQUIREMENTS TO THE FEDERAL STANDARD AND OTHER STATES’

State false advertising laws are important to consumers because the federal prohibition on false advertising, found in the Lanham Act,¹³² only permits standing for business competitors.¹³³ While the Lanham Act undoubtedly benefits consumers by imposing some degree of accountability on businesses and encouraging honesty in the marketplace, the total lack of standing for private individuals forces consumers to rely entirely on state law remedies.¹³⁴

Through the experience of Prop. 64’s initial interpretation, which is echoed at the state level around the country,¹³⁵ consumers are at a serious disadvantage in the fight against false advertising. In Alabama, for example, the test for a private individual’s right of action under the state’s false advertising statute is a showing that the plaintiff “suffered any monetary damage as a result of . . . ‘unconscionable, false, misleading or deceptive act or practice in the conduct of trade’”¹³⁶ New York’s deceptive business statute

130. *Id.*

131. *California General Election: State Ballot Measures*, CAL. SEC’Y OF STATE, <http://vote2004.sos.ca.gov/Returns/prop/00.htm> (last updated Dec. 7, 2004).

132. 15 U.S.C. § 1125(a) (2012).

133. *See Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971) (“Congress’s purpose in enacting § 43(a) was to create a special and limited unfair competition remedy, virtually without regard for the interests of consumers generally and almost certainly without any consideration of consumer rights of action in particular.”); *see In re Agent Orange Prod. Liab. Litig.*, 475 F. Supp. 928, 934 (E.D.N.Y. 1979); *see also* Brian Morris, *Consumer Standing to Sue for False and Misleading Advertising Under Section 43(a) of the Lanham Trademark Act*, 17 MEM. ST. U. L. REV. 417, 427 (1987) (describing the Second Circuit’s holding in *Colligan* that consumers lack standing under the Lanham Act).

134. BeVier, *supra* note 16, at 16; *see* Tushnet, *supra* note 54, at 1375.

135. *See generally* Carter, *supra* note 17 (summarizing the discrepancies in the various fifty states’ Unfair and Deceptive Acts and Practices statutes that protect consumers from unfair business practices).

136. Deceptive Trade Practices Act, ALA. CODE § 8-19-5 (2002); *Billions v. White & Stafford Furniture Co.*, 528 So. 2d 878, 880 (Ala. Civ. App. 1988).

mirrors California's, providing that an individual person may bring suit for "deceptive practices in the conduct of business" only if that person has suffered financial injury as a result of the deception.¹³⁷ State statutes such as these, which severely restrict consumers' standing, are not anomalous. Rather, in addition to the examples listed above, sixteen other states have statutes that are roughly comparable to California's UCL¹³⁸ and likewise include California's high bar for establishing consumer standing.¹³⁹ The status of state false advertising and unfair competition statutes thus underscores how unique the Ninth Circuit's interpretation of California law was in *Hinojos*.

VI. CONCLUSION

The broader implication of the *Hinojos* holding is a rollback on a movement by business interests to limit their liability for false advertising. The campaign for Prop. 64 and other legal efforts to limit the scope of consumer protection laws have significantly obstructed consumer access to the civil justice system over the last two decades,¹⁴⁰ and—as feared by its opponents—Prop. 64 has had a "devastating impact on innocent" Californians.¹⁴¹ Yet, the Ninth Circuit's decision in *Hinojos* may signal a wind shift in the arena of private individual standing for unfair business practices claims.

Given the materiality standard announced in *Kwikset* and affirmed for false sales in *Hinojos*, when *Hinojos*'s case returns to district court on remand, *Hinojos* has a strong chance of obtaining relief against Kohl's. To achieve this result, *Hinojos* must effectively

137. Consumer Protection Act, N.Y. GEN. BUS. LAW § 349 (McKinney 1984).

138. Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions, Unfair Competition Litigation*, 26 CAL. L. REVISION COMM'N REP. 191, 239 (1996).

139. ALASKA STAT. § 45.50.471 (2013); CONN. GEN. STAT. ANN. § 42-110b (West 2012); FLA. STAT. ANN. § 501.204 (West 2013); HAW. REV. STAT. § 480-2 (2013); 121 1/2 ILL. COMP. STAT. 262 (2013); LA. REV. STAT. ANN. art. 51 § 1405 (2003); ME. REV. STAT. ANN. tit. 5, § 207 (2013); MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 2006); MONT. CODE ANN. § 30-14-103 (West 2012); NEB. REV. STAT. § 59-1602 (2010); N.C. GEN. STAT. § 75-1.1 (2013); S.C. CODE ANN. § 39-5-20 (1985); UTAH CODE ANN. § 13-5-2.5 (LexisNexis 2013); VT. STAT. ANN. tit. 9, § 2453 (2006); WASH. REV. CODE ANN. § 19.86.020 (West 2013); WISC. STAT. ANN. § 100.20 (West 2013).

140. See HOT COFFEE, *supra* note 54; see also CTR. FOR JUSTICE & DEMOCRACY, *supra* note 4 (stating that as a result of CALAs, "statistics reflect juries' increasingly antagonistic attitude toward injured plaintiffs").

141. President William J. Clinton, Remarks on Vetoing Product Liability Legislation and an Exchange With Reporters (May 2, 1996) (transcript available via The American Presidency Project).

convey that his decision to purchase items at Kohl's was based on a belief that Kohl's apparent price reductions presented a deal too good to pass up.

In sum, despite the fears of California business interests that *Hinojos* opens the floodgates to frivolous lawsuits,¹⁴² the decision is, in fact, in accord with California voters' belief that Prop. 64 protects businesses from frivolous claims while retaining actual victims' ability to pursue legitimate claims.

The balance of legislative intent, consumer protection policy, and traditional understandings of what constitutes injury, as applied in *Hinojos*, represents a sensible approach to the application of false advertising laws that ought to be reflected at the federal level as well. Although *Hinojos* is limited to California, the Ninth Circuit's approach should put the other states in the circuit on notice as to the Ninth Circuit's likely interpretation of the standing requirement in connection with other unfair competition laws. Hopefully, the Ninth Circuit's decision is the first of many judicial and legislative actions to acknowledge the value of standing for private consumer actions when deceptive business practices are in play.

142. See Press Release, Am. Tort Reform Ass'n, 'The Next Big Thing' in Litigation Abuse, ATRA Cites Exploitation of State Consumer Protection Acts a Growing Concern (July 13, 2006), available at <http://www.atra.org/newsroom/next-big-thing-litigation-abuse>; see also Lifsher & Levin, *supra* note 117 (discussing Prop. 64's alleged main purpose of ridding the California legal system of "shakedown lawsuits" that allegedly only benefitted unscrupulous lawyers).